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Bankruptcy legislation is to be vigorously pressed upon the attention of members at the coming meeting of congress, and it is sincerely to be hoped that a wise and equitable law of that character will be speedily adopted. The provision known as the Torrey Bankruptcy Bill passed the house in the last congress, almost to the surprise of the advocates of the bill, who had seen bankruptcy bills die in the house time after time since the repealing of the old measure. The political complexion of the house is much changed from that of the last house, and there are so many new members that it is impossible to tell how the house will vote. While there may be some minor objections to the Torrey bill, and though there is a certain amount of opposition to any legislation on this subject, the strongest sentiment is undoubtedly in its favor. The distinguished Chief Justice Stone, of the Supreme Court of Alabama, has recently taken occasion to urge its passage, taking advanced ground in favor of the dual system of bankruptcy insisting that it would be immoral, unbusiness-like and imperfect statesmanship to attempt to cater, in such legislation, to either the debtor or the creditor class. The enactment of a purely voluntary law, he said, would give dishonest debtors an opportunity to deliberately prepare for bankruptcy, and it would follow that the credit of debtors, the honest as well as the dishonest, would be greatly impaired, if not entirely destroyed, and the result would be a calamity to those whom the advocates of that system wish to benefit. The bill before congress is in no sense a political measure. As we have said before, it is substantially the bill drafted by Judge Lowell with, however, some wise changes and additions. It has received the indorsement of commercial organizations and of those competent to pass judgment upon such legislation. The need of a uniform bankrupt law is imperative, particularly in view of the unsatisfactory condition of State insolvent laws.

The learned Chief Justice Bleckley of the Georgia Supreme Court is noted for the originality of his ideas and the felicity of their expression. One of his recent decisons—Broome v. Davis—is an additional evidence of this happy faculty and shows as well that the venerable judge possesses, in a remarkable degree, the ability to use language discretly and to the point. In that case the court found it necessary to reverse a decision by Judge Lumpkin, of the same bench, rendered by him while a member of the lower court. Chief Justice Bleckley begins his review of the case by saying that "before the translation of our brother Lumpkin to this bench, though his judicial accuracy was remarkable, he shared in the fallibility which is inherent in all courts, except those of last resort. In some rare instances he committed error and the very last of his errors is now before us for correction." We take it that Brother Lumpkin, as any other trial judge, does not mind an occasional reversal where the sting is removed as in this case. It is unnecessary to say, perhaps, that the chief justice used the expression as to the infallibility of courts of last resort in a picknickian sense, or it is possible that he has reference only to the Supreme Court of Georgia of whose infallibility he has positive knowledge.

One of the first decisions rendered by the newly constituted federal court of appeals is an interesting one on a point of banking law. A broker in commercial paper sold to the National State Bank of Elizabeth, N. J., several drafts at a discount of fifteen per cent. When the bank brought suit on the drafts the United States Circuit Court held that it had acquired them by purchase and not by discount and therefore the rate of interest was not usurious under the National Banking Act.

The court of appeals of the circuit overrules this decision. It decides that under the law of congress there is no distinction between discount and purchase in the acquisition of notes and drafts, even when, as in this case, the paper is not indorsed by the person from whom the bank gets it, and that if more than the legal rate of interest is taken the transaction is usurious. The decision, if allowed to stand, will be far reaching in its consequences, as it practically removes the distinction, heretofore made, between an outright sale and a discount of commercial paper.

NOTES OF RECENT DECISIONS.

UNITED STATES SUPREME COURT—JURISDICTION—FEDERAL QUESTION—RECEIVER.—In McNulta v. Lockridge, the Supreme Court of the United States hold that whether a receiver appointed by a federal court can be sued for the act of his predecessor in office without leave of court, by virtue of Act Congress, March 3, 1887, § 3 (24 St. 552), which provides that a receiver may be sued in respect of any act "of his" in carrying on the business without previous leave of the court appointing him, is a question of general law; and the decision of a State supreme court that such a suit may be maintained will not entitle the receiver to a review of the ruling by the United States Supreme Court. A claim by a receiver appointed by a federal court that he is not subject to suit for the act of his predecessor in the office, without previous leave of such court, is the claim of an immunity under an "authority exercised under the United States," within the meaning of Rev. St. U. S. § 709, giving the right to a review by the United States Supreme Court when such authority is denied by a decision of a State supreme court. Act Congress, March 3, 1887, § 3 (24 St. 552), providing that every receiver appointed by a federal court may be sued "in respect of any act or transaction of his in carrying on the business" without leave of the court appointing him, applies to such a receiver in respect of an act of his predecessor in the office.

TESTAMENTARY COVENANT—VALIDITY.—In Krell v. Codman, the Supreme Court of Massachusetts hold that a voluntary covenant in writing, that the covenantor's executors shall, after her death, pay the covenantee a certain sum, is not contrary to the policy of the laws of Massachusetts. Holmes, J., says:

This is an action on a voluntary covenant executed by the defendant's testatrix, in England, that her executors within six months after her death should pay to the plaintiffs upon certain trusts the sum of £2,500, with interest at 4 per cent. from the day of her death. It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies; but it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover; and, in the view which we take on that question, it is needless to examine with nicety how far the case is to be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. Parker v. Coburn, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. Parish v. Stone, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant, in all other respects unquestionably valid and binding—Comstock v. Son (Mass.), 28 N. E. Rep. 296; Mather v. Corliss, 103 Mass. 568, 571—was void as contravening the policy of our statute of wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid. Wellington v. Apthorp, 145 Mass. 69, 13 N. E. Rep. 10. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. St. 1888, ch. 372. Again, it would be going a good way to say, by construction, that a covenant did not satisfy this statute.

The truth is that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See Perry v. Cross, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible, with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers, and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promise. Of course, we are not speaking of the rank of such contracts *inter se*. Stone v. Gerrish, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument declared on did not purport to be, and was not, a contract. Cover v. Stem, 67 Md. 449, 10 Atl. Rep. 231, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which, if she had gone into bankruptcy, would have been provable against her. *Ex parte* Tindal, 8 Bing. 402; 1 Deac. & C. 291; Mont. Bankr. L. 375, 462; Robs. Bank. (5th Ed.) 274. The cases of Parish v. Stone, 14 Pick. 198, and Warren v. Durfee, 126 Mass. 338, were actions on promissory notes, and were decided on the grounds of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, if such intent could be material when an otherwise binding contract was made. See Stone v. Hackett, 12 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

BUILDING ASSOCIATION—BY-LAWS—IMPAIRING VESTED RIGHTS.—In Holyoke Building & Loan Association v. Lewis, decided by the Supreme Court of Colorado, plaintiff became a member of defendant building association at a time when a by-law thereof provided that "all non-borrowing stockholders wishing to withdraw shall be privileged so to do upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in, without interest." It was held that plaintiff's right of withdrawal was a vested right, of which defendant could not deprive him, without his consent, by a subsequent repeal of the by-law. Richmond, P. J., says:

This was an action on a money demand, and was originally tried upon an agreed state of facts which, in substance, are that Jerome Lewis, the defendant in error, paid into the Holyoke Building & Loan Association, plaintiff in error, the sum of $75, thereby becoming a member of the association. At the time of payment there was an article of the by-laws which read as follows: "All non-borrowing stockholders wishing to withdraw shall be privileged so to do, upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in, without interest." Defendant in error gave the notice, the association declined to return the money, insisting that since the payment by Lewis the directors of the asociation had repealed the article of the by-laws referred to, and therefore defendant in error was not entitled to withdraw the money from the association. Judgment was rendered in favor of defendant in error for the amount of his demand. To reverse this judgment this error is prosecuted.

The rule of law is that a corporation has not the right to repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-laws, although the power to alter, amend or repeal its by-laws is granted by charter. End. Build. Ass'ns, § 278; Insurance Co. v. Connor, 17 Pa. St. 136; Revere v. Copper Co., 15 Pick. 351; Ang. & A. Corp. § 342. When that by-law was adopted it was as much the law of the corporation as if its provisions had been part of the charter. But it is insisted that the corporation could alter, amend, add to or repeal by-laws before made, and that by virtue of this authority Lewis is precluded or estopped from asserting his rights under the article mentioned. The power to make by-laws is to make such as are not inconsistent with the constitution and the law, and the power to alter has the same limit, so that no alteration or repeal could be made which would infringe a right already given and secured by contract with the corporation. No private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of a by-law afterwards repealed. All by-laws must be reasonable and consistent with the general principles of the laws of the land, which is to be determined by the court when a case is properly before them. But a by-law that will disturb a vested right is not such. Kent v. Mining Co., 78 N. Y. 159. "By-laws are the corporation's charter, and are subject to the constitution and general laws of the State. They fix the right of stockholders, and are in the nature of a fundamentrl contract in form between the corporators, and in practical effect between the association and its stockholders—a contract which, as in all other cases, neither party is at liberty to violate. Any attempt on the part of the corporation, by by-laws or otherwise, to deprive a member of a right secured to him by the corporate articles, is in excess of its authority." Bergman v. Association, 29 Minn. 275, 13 N. W. Rep. 120. The fact that Lewis was a non-borrowing stockholder is not denied. That he gave the notice under the article of the by-laws referred to, and that he had paid in the amount of money which he sought to recover, is admitted. His right, therefore, of withdrawal, was a vested right, which the corporation, without his assent, could not deprive him of.

SITUS OF TAXATION OF CORPORATIONS AND OF CORPORATE SHARES.

II.

What, then, are the restrictions imposed by the national constitution upon the otherwise absolute power of the States to tax? They are believed to be: 1, the State may not tax the instrumentalities of the general government; and 2, the State may not tax in such a manner so as to regulate interstate or foreign commerce. As to the first restriction, it is more properly a prohibition, for in no place nor manner may the State tax the agencies of the general government. And a State has no power to tax the operations of a corporation, which corporation is engaged as an instrumentality of the general government,[1] as the power to tax involves the power to destroy, and if a State possessed this power, it could destroy, if it wished, any agency of the general government, and cripple or destroy even the nation itself. But in McCullough v. Maryland, it was intimated that the State might tax the real and personal property of such a corporation; and in the

[1] McCullough v. Maryland, 4 Wheat. 431; also Osborn v. Bank, 9 Wheat. 738.

case of the Railroad v. Peniston,[2] it was held that the State of Nebraska could tax the real and personal property of the Union Pacific Railroad Company, which company was organized under laws of the United States, the distinction being that a tax upon the property of a corporation is not necessarily an impediment to the proper exercise of the corporate functions, while a tax upon the operations of a corporation is a direct and positive restriction of the functions of the corporation.

The commerce clause of the national constitution has given rise to an almost endless number of decisions, and it must be confessed that the decisions are not at all harmonious. It would be a waste of time to examine all the cases, and a few only will be noticed, wherein States have attempted to exercise the sovereign power of taxation, and the attempt has been held to be in either a regulation of interstate or foreign commerce, or was a legitimate exercise of the reserved powers of the State. It is not considered a regulation of interstate commerce to impose a tax in the shape of a license, under the proper exercise of the police power of the State. Thus, when the city of Mobile imposed a license of fifty dollars upon every express and railroad company, operating entirely within the city; one hundred dollars on those operating within the city and State, but not beyond the State; and five hundred dollars upon those doing business which extended beyond the limits of the State, it was held that the license fees were not repugnant to the clause in the national constitution giving congress sole power to regulate commerce between the States.[3] While a license of fifty dollars imposed by the State of Tennessee upon each sleeping car, not owned by the railroad, was held to be repugnant to the above clause.[4]

It would seem that a foreign corporation that is not an agency of the national government, and that is not engaged in interstate or foreign commerce, and not being a citizen "entitled to all privileges and immunities of citizens in the several States," might be driven by taxation from the State in which it was attempting to do business. An insurance company is such a corporation. Mr. Justice Fields says: "Issuing a policy of insurance is not a transaction of commerce. These contracts are not articles of commerce in any proper sense of the word. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale."[5] A tax laid on freight carried from within the State to places without and from places without to places within is a direct regulation of interstate commerce, and therefore unconstitutional,[6] while a tax on the gross receipts received for such freight was held to be valid.[7] The distinction between the two cases is that the first is a tax on commerce, while the latter is a tax on the fruits of commerce, which fruits have become the personal property of the corporation. It has been intimated that if the latter case were to come up again it would be overruled, as the distinction above made is technical rather than substantial. In fact it may be questioned whether the principle enunciated in State Tax on Railway Gross Receipts has not been repudiated in two cases, one arising in Ohio, and the other in Alabama. Where these States attempted to tax the gross receipts of the Western Union Telegraph Company, the receipts being derived in part from messages sent to and received from places without the State, it was held in each case that the tax was unconstitutional.[8] It is true that in the latter case the question is amplicated by the fact that the Western Union Telegraph Company is organized under the laws of congress, and carries messages for the United States government at rates fixed by the postmaster-general, and to some extent is an agency of the government, and for that reason cannot be taxed. The State of Texas passed a law that "every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full rate message, and one-half cent for every message less than full rate." The Supreme Court of the United States held the tax void on the following grounds: 1. The telegraph is an instrument of commerce, and telegraph companies come within the province of that section of the United States constitution,

[2] 18 Wall. 5.
[3] Osborn v. Mobile, 16 Wall. 479.
[4] Pullman Co. v. Nolan, 22 Fed. Rep. 276.
[5] Paul v. Virginia, 8 Wall. 168.
[6] Case of State Freight Tax, 15 Wall. 232.
[7] State Tax on Railway Gross Receipts, 15 Wall. 284.
[8] Tel. Co. v. Ratterman, 127 U. S. 411; Tel. Co. v Alabama, 132 U. S. 472.

regulating commerce between the States, and when a State imposes a tax upon the messages sent without the State, irrespective of the distance carried or price charged, it is regulating commerce, and hence comes within the inhibition of the United States constitution against a State regulating interstate commerce. 2. The particular company in the case had received a charter from congress, and as part of its agreement, it was to carry messages of the United States government at rates fixed by the postmaster-general, and it thereby became an agency of the national government, and for that reason it could not be taxed.[9]

In Maryland it was held that palace cars, leased by a foreign corporation to a resident railway company, are not taxable within that State.[10] The leased rolling stock of a Virginia railroad was held not to be taxable by that State, on the ground that the State had not fixed the *situs* of such property within the State, seemingly not good reasoning.[11] In the case of the Pullman Car Co. v. Twombly,[12] where a tax was imposed on the rolling stock of a foreign corporation, Mr. Justice Brewer in an elaborate opinion which, however, was not directly called for by the issues of the case, held that as the tax in question was on the value of the cars, and assessed as other property was assessed, it was a valid tax. The learned justice thought it an astounding doctrine that a foreign corporation could keep its cars in the State of Iowa, claiming and enjoying the protection of the laws of that State for the property of the company, and then on the plea that such a tax was "regulating commerce between the States" refuse to share the burdens of taxation in return for the benefits received. And he further held that where such property is used continuously within the State, it acquires a *situs* therein, irrespective of place of ownership. He denied that any case could be found which held that a property tax was void, merely because the property upon which the tax was levied was employed in interstate commerce. The propositions of Mr. Justice Brewer as above stated found direct affirmance in a case where the State of Pennsylvania imposed a tax on such a proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the State bears to the whole number of miles over which its cars are operated. The above tax was held valid and constitutional, though such cars run into, through, and out of the State and were thereby employed in interstate commerce.[13] At the same term the same court decided, where the board of railway assessors of Kansas had assessed the sleeping-cars, dining-cars, and parlor-cars owned by a foreign corporation and leased by it to various railroad corporations in Kansas, and apportioned the tax among the counties according to the mileage of the railroads in each county, that a bill in equity to restrain the treasurers of the various counties from collecting the tax was demurrable.[14] At the same term it was also decided that Massachusetts could tax such proportion of the whole value of the capital stock of a foreign telegraph company as the length of its line in the State bears to the whole length of its line everywhere, after deducting the value of any property owned by it subject to local taxation in the cities and towns of the State.[15] In all these cases the objection was that the tax was unconstitutional because it interfered with or regulated interstate commerce, and it was urged that such property was taxable at the legal residence only of its owner. But as Justice Gray observed in Palace Car Company v. Pennsylvania, *supra:* "It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction."

But the rule against the right of the State to regulate interstate or foreign commerce is drawn with greater strictness in respect to the power of the State to tax vehicles used in commerce upon water then those employed in commerce upon land, "maritime transportation requires no artificial road-way. Nat-

[9] Tel. Co. v. Texas, 105 U. S. 460.
[10] Baltimore v. Pullman Co., 50 Md. 452.
[11] R. R. Co. v. Allen, 22 Fed. Rep. 376.
[12] 29 Fed. Rep. 658.
[13] Pullman's Palace Car Co. v. Pennsylvania, 11 Sup. Ct. Rep. 876.
[14] Pullman's Palace Car Co. v. Hayard, 11 Sup. Ct. Rep. 883.
[15] Att'y Gen. of Mass. v. W. U. Tel. Co., 11 Sup. Ct. Rep. 889, following Telegraph Co. v. Mass., 125 U. S. 530.

ure has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse, no franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."[16] A ferry company organized under the laws of Illinois, and engaged in transporting freight and passengers across the Mississippi river at St. Louis, and having its principal office in that city, and there holding its business meetings, is not taxable on its ferry-boats in St. Louis.[17] A ferry company organized under the laws of New Jersey, had its offices and real estate in that State, and owning nothing in Pennsylvania except the lease of a wharf, where it received and discharged freight and passengers. The latter State taxed the corporation on its capital stock, on the ground that the company was doing "business" within the State,[18] but the Supreme Court of the United States held the tax invalid on the ground that it was a regulation of interstate commerce, and reversed the decision.[19] A vessel registered in Port Townsend, and owned in part in California, but touching only occasionally at California ports, is not taxable in the latter State.[20] Vessels plying between San Francisco and other ports without the State and owned and registered in New York are not taxable in California.[21] The fact that a vessel is engaged exclusively in navigating the waters of a State does not authorize the imposition of a townage tax by that State.[22] A State tax upon the gross receipts of a steamship company, incorporated under the laws of the State imposing the tax, which receipts are derived from transporting passengers and freight by sea to and from other States and foreign countries, is a regulation of interstate and foreign commerce, and is therefore void.[23] The *situs* of taxation of shipping is the place of registration.[24] If unregistered, it is taxable where the corporation or owner resides.[25] Where a vessel may be taxed in several districts, taxation in one of them is exclusive of the others.[26]

It may lead to a clearer view to consider the taxation of the capital stock of a corporation and the shares of capital stock together, as much on account of the unlikeness as the likeness between them, for the capital stock belongs to the corporation, while the shares of capital stock belong to the individual owner, the two being distinct legal entities.[27] The capital stock of a corporation is the money or property put into the corporate fund by the subscribers for said stock, which fund becomes the property of the corporation.[28] The shareholders because of ownership of stock have no legal claim upon the capital stock on any other property of the corporation, but only to the profits of the corporation during its continuance, and also after the affairs of the company are wound up and the debts paid, to the residuum.[29] At common law the capital stock was considered to be real estate.[30] Now, in many States the statute makes it personalty, and many courts in absence of a statute have so considered it;[31] and being personalty it is taxable at the residence of the corporation.[32] In Indiana it was held that the capital stock of a foreign corporation could not be taxed in that State.[33] But if such a corporation is doing a portion of its business within a State, it may be taxed within on such proportion of its whole capital stock as the business done within the State is a part of the whole business done.[34]

[16] Railroad Co. v. Maryland, 21 Wall. 456.
[17] St. Louis v. Ferry Co., 11 Wall. 423.
[18] Commonwealth v. Gloucester Ferry Co., 98 Pa. St. 105.
[19] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
[20] San Francisco v. Talbot, 63 Cal. 485.
[21] Hays v. Pac. M. St. Co., 17 How. 596.
[22] State Townage Tax Cases, 12 Wall. 204.
[23] Steamship Co. v. Pennsylvania, 122 U. S. 326. Compare with State Tax on Railway Gross Receipts, 15 Wall. 284.
[24] Hays v. Steamship Co. 17 How. 596.
[25] Pelton v. Transportation Co., 37 Ohio St. 450.
[26] Halstead v. Adams, 108 Ill. 609.
[27] 1 Desty on Taxation, § 73.
[28] Burrall v. Railroad Co., 75 N. Y. 211.
[29] Wood v. Dummer, 3 Mason, 308.
[30] Price v. Heirs, 6 Dana, 107; Copeland v. Copeland, 7 Bush. 349.
[31] Bridge Co. v. Adams County, 88 Ill. 615.
[32] Starch Co. v. Dalloway, 21 N. Y. 449.
[33] Riley v. Telegraph Co., 47 Ind. 511.
[34] Pullman, etc. Co. v. Pennsylvania, 11 Sup. Ct. Rep. 876; Att'y Gen. of Mass. v. Telegraph Co., 11 Sup. Ct. Rep. 889.

The nature of a share of stock has given rise to much discussion. Chief Justice Shaw says: "If a share in a bank is not a *chose in action*, it is in the nature of a *chose in action*, and what is more to the purpose, it is personal property."[35] And Chief Justice Durkee says: "A share then is a mere ideal thing, it is no portion of matter, it is no portion of space. In a legal sense, therefore, the real property of the corporation is as distinct from the shares of the stockholders, as the corporation itself is as a legal person, distinct from the shareholders as natural persons."[36] A share of stock is therefore taxable, in the absence of a statute, at the residence of the owner, without deduction on account of the taxation of the real and personal property by the State in which the corporation is located.[37] It was held in Maine that a resident of that State, holding shares in a Massachusetts corporation, was taxable in Maine on such shares to the extent which they represented the personal property of the corporation, but not for that portion which represented the real property.[38] This is utterly absurd for the shareholder does not own a jot or title of the personal property of the corporation, and such property if in law it follows the residence of anybody or anything, it must be the residence of the corporation, its owner. Under a statute, "stock in any corporation out of this State" is liable to be taxed here as personal property, "if not there assessed;" it was held that where the foreign State taxed the real and personal property of the corporation, the shares were not taxable, because the taxation of the property of the corporation was a virtual taxation of the shares.[39] But in Indiana a resident of that State, holding shares in a foreign corporation, was held to be taxable upon them, even though the State where the corporation was located taxed them also.[40] Such also was held to be the law in North Carolina.[41] It is a controverted question whether a State may tax the shares of a domestic corporation in the hands of non-residents. Iowa and Maryland hold that the State has the power.[42] On the other hand Mr. Redfield strongly contends that such taxation is unconstitutional.[43] Bank stock of a resident bank, owned by a non-resident, was held not to be taxable in Tennessee.[44] And where shares in a corporation are taxable to the shareholders, it is not competent for the State to tax the shares of non-residents by taxing the corporation for the amount of such shares.[45]

However true it may be that the *situs* of taxation of corporate shares, in the absence of a statute providing otherwise, is the domicile of the owner, yet, for purposes of taxation, the law which created the corporation can separate the shares from their owners, and give them a *situs* of their own. So shares in a national bank under the national banking act are taxable "at the place where the bank is located."[46] This "place," in the opinion of the justices of the Supreme Court of Maine, was the municipal corporation where the bank was located.[47] On the other hand it was held in Massachusetts that the legislature could authorize the assessment of such tax in the city or town within the same State where the owner resided." To settle the doubt, congress passed an amendatory act which made the meaning of "place" to correspond with the Massachusetts decision. So it was held in the case of Tappan v. Merchant's National Bank,[48] that the legislature of Illinois might require all the shares to be taxed in the taxing district where the bank was located without reference to the residence of the owners of the shares.

Shares of a foreign corporation owned by a resident of Alabama, but deposited by him for safe-keeping in New York city, are not taxable in Alabama, as the property is not within the protection of the laws of that State.[49] This latter case recognizes a principle not often followed that a State has no right to tax property out of its jurisdiction and which receives no protection from its laws, even though that property is intangible personalty which in contemplation of law is supposed to follow strictly the domicile of its owner.

W. W. QUARTERMASS.

[35] Hutchins v. State Bank, 12 Met. 421.
[36] Arnold v. Ruggles, 1 R. I. 165.
[37] Dwight v. May, 12 Allen, 316.
[38] Holton v. Bangor, 23 Me. 264.
[39] Smith v. Exeter, 37 N. H. 556.
[40] Seward v. Rising Sun, 79 Ind. 351.
[41] North v. Commissioners, 90 N. C. 409.
[42] Faxton v. McCosh, 12 Iowa, 527; The Tax Cases, 2 G. & J. 117.
[43] Sup. to Red. Am. Ry. Cases, 493.
[44] Bank v. State, 9 Yerg. 490.
[45] State v. Thomas, 26 N. J. L. 181.
[46] Tappan v. Mer. Nat. Bank, 19 Wall. 490.
[47] 53 Me. 594.
[48] *Supra*.
[49] Varnum v. Collins, 48 Ala. 178.

NEGLIGENCE—PROXIMATE AND REMOTE CAUSE.

WHITE SEWING-MACHINE CO. V. RICHTER.

Appellate Court of Indiana, September 18, 1891.

1. Plaintiff sold a sewing-machine weighing two hundred pounds, and the purchaser transferred it to defendant company, which agreed to remove it from plaintiff's premises. She told defendant's agent, who came after it, that he could not remove it alone without taking it apart, and that she had taken off the belt, and that if he raised it without replacing it, the top would be likely to fall. He paid no attention to her, but attempted to shoulder the machine; and the top did fall, and striking the wall, rebounded to the floor, broke into pieces, one of which put out plaintiff's eye. *Held*, that the negligence of defendant's agent was the proximate cause of the injury.

2. The removal of the belt was not negligence on her part; and even if it was, defendant is liable for the negligence of its agent after he knew the condition of the machine.

3. The fact that a man who was engaged in removing plaintiff's goods, assisted defendant's agent, at his request, to shoulder the machine, will not affect plaintiff's right to recover, since he was not acting for her in so doing.

CRUMPACKER, J.: This action was brought by Susan Richter against the White Sewing-Machine Company and others, to recover damages inflicted upon her by the alleged carelessness of the defendant in attempting to remove a sewing-machine from her house. She had a verdict and judgment against the company in the court below, and this appeal raises the question of the sufficiency of the evidence to sustain the verdict. There was evidence fairly tending to establish the following facts: Mrs. Richter was the owner of a large iron-framed sewing-machine, manufactured for tailor's use, which she sold to one Mrs. Huey, who in turn sold it to the company in part payment for a new machine. The company agreed to take the old machine from Mrs. Richter's house, and on the day of the alleged injury one Barber, an employee of the company, went there for that purpose. The machine weighed about 200 pounds, and when Barber came Mrs. Richter told him that he could not remove it alone without taking off the top, embracing the machinery and gearing and she removed the belt so the top could be taken off. Barber insisted that he could carry the machine without taking it apart, if he could get it upon his shoulders. She protested, and sought to convince him that he could not, and told him that it had required two men to carry it whenever it was moved before, and called his attention to the fact that the belt was off and the top loose, and, if he undertook to shoulder the machine without replacing the belt, the top was likely to fall off and break. He gave no heed to her protestations, however, and asked a man who was then moving Mrs. Richter's household goods to assist him in shouldering the machine, which he undertook to do, but, when the machine was being raised, it was not kept level, and the top fell off, striking against the wall, and rebounding to the floor, and broke in pieces. Mrs. Richter was standing near when the top fell, and a piece of iron struck her as it broke, and entirely destroyed one of her eyes. Barber knew that the belt was off when he undertook to lift the machine, and that there was nothing to hold the top in its place, and that it was liable to fall and break.

Appellant's counsel insist that the fact that the top of the machine first struck the wall, and then fell to the floor, destroyed the chain of causation, in the view of the law, between the act and the injury, on the theory that the wall was an intervening agency. We know of no instance where the law has been applied upon that theory under such circumstances, and we have been referred to none. Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but, as a rule, these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the original wrong-doer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be an efficient cause of the injury. It is also true that if a rational being, responsible for his own acts, should wrongfully intervene, and interrupt the casual connection by adding a new, independent, and efficient force, the original wrong-doer would be relieved from responsibility for the resultant injury; but this case presents no such a question. Barber knew of the presence of the wall when he undertook to lift the machine. His careless act in undertaking to remove the machine in the manner and under the circumstances that he did was the proximate cause of the injury.

It is next insisted that the injury was such an extraordinary and unlooked-for occurrence that it could not have been foreseen, and is, consequently, too remote to afford the basis of a legal liability. Every rational being is responsible for his careless acts, and the consequences which follow, according to the practical application of the laws of cause and effect, whether he was able to anticipate the particular result or not. In Shearman & Redfield's valuable treatise on the Law of Negligence (section 29), the law is laid down as follows: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow, if they had been suggested to his mind." In the case of Railway Co. v. Wood, 113 Ind. 544, 14 N. E. Rep.

572, and 16 N. E. Rep. 197, the court said: "There is a plain difference between a wrongful act and its consequences; for when a wrongful act is done, the wrong-doer must answer for all proximiate consequences, although he may not have foreseen or anticipated the particular form or character of the resulting injury." The Supreme Court of Massachusetts, in Hill v. Winsor, 118 Mass. 251, said: "The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway; it may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other." In the case before us, Barber knew of the condition of the machine, and the liability of the top to fall and break. He was duly warned of the consequences to this extent before he undertook to remove it, and, disregarding the warning, he attempted to remove the machine in its dangerous condition, and the accident resulted. Under clear and explicit instructions, the jury found the negligence of Barber in handling the machine to be the natural and proximate cause of the injury, and we see no reason for disturbing the finding.

It is also argued on behalf of appellant that the appellee was guilty of contributory negligence in removing the belt from the machine, thus making it possible for the accident to occur. She removed the belt to enable Barber to take the machine apart, so it could be handled without difficulty or danger, and so informed him. This was not an act of negligence as a matter of law, and, even if it was, Barber was fully advised of the condition of the machine before undertaking to handle it, and after such knowledge the law required him to use caution commensurate with the known or apparent danger. It is doubtful if an original act of negligence upon the part of the appellee, which was known to the appellant, would exonerate the latter from liability, if by the exercise of ordinary care it could have avoided the injury, notwithstanding appellee's blamable act. It is said in Shearman & Redfield on Negligence (section 99): "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed, although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy." We think this principle of law is applicable to the facts in the case at bar. The fact that the man who was moving appellee's household goods helped Barber lift the machine upon his shoulder cannot affect the right recovery. He rendered the assistance at Barber's request, and was not acting for the appellee while so engaged. In our opinion, the evidence sustains the verdict. Judgment affirmed, with costs.

NOTE.—The doctrine of the principal case, that where the current of responsible connection between the negligent act and the injury is interrupted, the defendant is not liable, has long been established. The difficulty arises from its practical application to a given state of facts. It may be interesting to note some of the more recent cases in which it has been invoked. In Renner v. Canfield, 30 N. W. Rep. 435, 36 Minn. 90, the defendant, while on the highway in proximity to the residence of plaintiff, shot and killed the dog of a third person. The wife of plaintiff was near the house and saw the shooting, although the defendant was not aware of her presence. She was at the time pregnant and in a delicate state of health, and her fright, due to a large extent to the mistaken impression that defendant aimed his gun at her, was such as to seriously affect her health. It was held that the shooting of the dog was not the proximate cause of the injury to plaintiff's wife. In Lehman v. Brooklyn City R. Co., 47 Hun, 355, the plaintiff, a married woman in an advanced state of pregnancy, was standing in the door of her husband's house on a city street, with her little child four or five years of age, when a horse, belonging to defendant company, which had run away, dashed up the street at a high rate of speed with the whiffle-tree dragging after him. The horse plunged toward the woman, but his progress was arrested by a post against which he fell and put out his eye. She was not touched by the horse, but sustained a severe shock from the fright which brought on a long train of nervous diseases. It was held that she could not recover. See also Phillips v. Dickenson, 85 Ill. 11; Huxey v. Berg, 1 Stark, 98; Hadley v. Baxendale, 9 Exch. 341; Allsop v. Allsop, 5 Hurl. & N. 534; Mire v. East La. R. Co., 7 S. E. Rep. 473.

Where a passenger carrier, having contracted to carry plaintiff to her home, set her down a mile from her residence on the sidewalk of a frequented street along which ran a line of street cars, passing within a square of her house, on a cold, dry day, and plaintiff, who, though delicate, was not ill and warmly clad, walked home with a friend, and thereby took a cold which permanently injured her health, it was held that the damages were too remote. Francis v. St. Louis Transfer Co., 5 Mo. App. 7. See Pullman Palace Car Co. v. Barker, 4 Colo. 344. Very similar are the cases where railway passengers have been carried to the wrong station, and have suffered in health in consequence of exposure and the want of proper accommodations. Hobbs v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391. But in Mobile, etc. R. Co. v. McArthur, 43 Miss. 180, a plaintiff who was subject to rheumatism, and got carried past his station and had to walk back in the rain, was permitted to recover.

Where defendant's cars became uncoupled in consequence of the breaking of a defective link, and plaintiff, a brakeman, in attempting to recouple, sustained serious injuries, it was held that the defective link was the remote, not the proximate cause of the injury. Pryor v. L. & N. R. Co., 8 South. Rep. 55.

A train load of cotton was delayed in the compress yard for half an hour after the usual starting time,

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and a fire having broken out in the compress it was consumed; the court held that the proximate cause of the loss was the failure of the train to depart on time. Derring v. Merchants' C. P. & S. Co., 17 S. W. Rep. 89. But where defendants, who were commission merchants, neglected to sell their principal's cotton after instructions to do so, and it was destroyed by fire, the delay was held not to be the proximate cause of the loss. Lehman v. Pritchett, 4 South. Rep. 601. Nor can negligence in transmitting a telegraphic message be regarded as the proximate cause of a loss from not being able to take advantage of a rise in the cotton market. Frazer v. Western Union Tel. Co., 4 South. Rep. 831. See also Bank of Commerce v. Ginnocchio, 27 Mo. App. 661.

Railroad fires have been exceedingly prolific of questions of remote and proximate cause. In Liming v. Illinois Central R. Co., 47 N. W. Rep. 66, plaintiff and his neighbor having discovered a fire which was set by defendant's engines, tried to put it out, but being unsuccessful, went to the barn to save some horses belonging to the neighbor. As they entered the barn the fire was a hundred feet away; but reaching higher ground and catching the full force of the wind, it was driven rapidly directly towards the barn, and when the horses were unfastened and being taken out, the plaintiff discovered that it had reached the door which was the only exit, and in passing through the fire he received the injuries complained of. The court held defendant's negligence in setting out the fire was the proximate cause of the injury rather than plaintiff's efforts to save his neighbor's property. But where sparks from defendant's smoke-stack started a fire which destroyed several buildings, the fire apparatus in the village being insufficient, and the wind changing, plaintiff's building caught, it was held that defendant's negligent act was not the proximate cause of the injury. Read v. Nicholas, 23 N. E. Rep. 468. See also Ryan v. New York Cent. R. Co., 35 N. Y. 210; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353.

In a very recent case (O'Connor v. Andrews, 16 S. W. Rep. 628), where plaintiff was injured by the falling of a cornice and fire wall of a building, it was held that the owner was not relieved from liability by the fact that the fall was caused by the accidental pulling of an electric wire attached to the cornice by a third person, if it appears that he knew or might have known that the wire was so attached. See also Mars v. Delaware, etc. Canal Co., 8 N. Y. St. 107, 54 Hun, 625. Where plaintiff was driving with due care along a highway in the dark, and his horse, startled by another vehicle approaching from behind, began to run and brought his wagon into collision with a post left too near the traveled part of the highway, causing the injury complained of, the court declined to set aside a verdict on the ground that the location of the post was only the concurring cause of the accident, the primary cause being the running of plaintiff's horse. Yeaw v. Williams, 15 R. I. 20. See Beall v. Township of Athens, 45 N. W. Rep. 1014, 81 Mich. 536; Nashua, I. & S. Co. v. Worcester, etc. R. Co., 62 N. H. 159. An elevated railroad company which dropped a burning coal on a horse and caused him to run against a traveler, was held liable for an injury to plaintiff caused by the traveler's efforts to escape. Lavery v. Manhattan R. Co., 99 N. Y. 158. And where the gate-keeper at a railway crossing lowered the gate so that it struck plaintiff's horse on the head and caused him to run away, and while plaintiff was attempting to restrain him, one of the reins broke and caused the horse to turn suddenly, throwing plaintiff out and injuring him, the gate-keeper's negligence and not the defective rein was the proximate cause of the injury. Putman v. New York, etc. R. Co., 47 Hun, 439. See also Nashua, I. & S. Co. v. Worcester, etc. R. Co., 62 N. H. 159; Phillips v. De Wald, 7 S. E. Rep. 151, 79 Ga. 732; Mars v. Delaware Canal Co., 8 N. Y. St. 107, 54 Hun, 625; Louisville, etc. R. Co. v. Kelsey, 7 South. Rep. 648.

WM. L. MURFREE, JR.

JETSAM AND FLOTSAM.

HE OF ALBANY AGAIN.— Our flippant friend, he of the *Albany Law Journal*, is once more aroused. Last summer he came forth from the solitudes of Albany and took a hurried tourist trip to Europe to see the world, and while abroad was cruel enough not to allow his contemporaries to experience some slight relief from his literary attempts, but addressed a series of letters to his own journal, describing his emotions, and inflicted on his readers some most lamentable rhymes.

It is true that he apologized for this ungenerous action in his issue of September 5th, and stated that he arrived home "completely vacuous in mind." We were much concerned on reading this announcement, as we had hoped that an ocean voyage and a glimpse at the great world would have worked some change in his mental condition, or at least afforded him some relief from those disorders under which he has so long labored, notably, rabid Anglophobia and irresponsibility on the question of "Woman's Rights." We nervously awaited developments, and we had not long to wait. The *Scottish Journal of Jurisprudence* took exception to some of his unusually anserous remarks on things British, and in an article entitled "A traveling editor" administered a little paternal castigation to our verdant traveler, which article we reprinted under the same name with a few comments thereon. About the same time our excellent contemporary, THE CENTRAL LAW JOURNAL, incurred the hostility of our tourist by some amusing strictures on his laughable effort to cultivate a literary style, terminating, as they invariably do, in gymnastics of a diverting kind. Goaded by these pleasantries, our traveler in a recent issue attacks all three in his customary frenzied manner, and affords us all not a little amusement.

That the article is willfully inaccurate in its references to this journal might be inferred from the fact that it was written by one who has the amazing effrontery to state that he could "not get a decent piece of roast beef in London," or his daughter "a pair of five and a half gloves" in that city!

That it is abusive and impertinent may be inferred from the fact that it was written by one who had the impudence and mendacity to state in the columns of his journal that the "average English husband is a domestic * * * tryant, who can commit adultery at pleasure," and that his wife is a "poor, weak-spirited slave * * * who rather admires such treatment!"

That it contains a vicious and jaundiced attack on "Scotch, Canadian and other outlandish periodicals" while in that very issue the tourist unblushingly appropriates nearly nine columns from the *Canada Law Journal* is not surprising, because it is by such evidences of a subverted and unbalanced mind that this fantastic one has come to be recognized as the buffoon of the legal press.

We have nothing to say to that part of his article which snarls at the CENTRAL LAW JOURNAL, as that paper is well able to take care of itself, and needs no commendation from us or from others. The rest of his screed, as might be expected from his insolent braggadocio in other matters, is devoted to vulgarly and discordantly blowing the editorial fish-horn in praise of his woeful wares.

Blow not thy trump so loud in thine own praise, O gifted friend! lest it should chance that one who knows thee not, yet hears the din, might step aside and lift the skin, and find beneath thy sorry hide. Vale!—*Western Law Times.*

Directors may be held responsible in 1891 for dividends paid out of capital so far back as 1869, as was shown the other day in *Re* Sharpe; *Re* Bennett; Masonic and General Life Insurance Company Limited, v. Sharpe, 65 L. T. Rep. N. S. 76. Another recent case, this being on the Queen's Bench side (Cross and others v. Fisher and others, 65 L. T. Rep. N. S. 114), shows how far directors may be incurring responsibility if they do not carefully check and watch the proceedings of their servants. A secretary falsifies books or accounts, and the directors, who ought to supervise him, pay the penalty to the shareholders. In that case a building society issued advertisements inviting the public to lend money to the society. The money advanced to the society was paid to the secretary, who then gave an acknowledgment of the payment. Subsequently a receipt was given signed by two of the directors on behalf of the society. The secretary in many cases filled up the amount on the counterfoil of the receipt book as considerably less than the amount actually received, though the receipt itself contained the right amount. By means of this and other falsifications of the books of the society, the secretary was enabled to appropriate to his own use a large sum of money, and upon his absconding it was found that the society had borrowed a sum considerably in excess of the amount allowed by its rules. Mr. Justice Mathew held that the directors of the Hull and Holderness Conservative Building Society were personally liable for the amounts advanced by the society in excess of its borrowing powers, as they were cognizant of the course of business pursued by their secretary and held him out to the public as their agent, although they were wholly in ignorance of the frauds perpetrated by him. The moral for directors goes a step beyond Sir George Jessel's rule: "Be honest and diligent," and adds: "Do not trust too much to a secretary."—*London Law Times.*

BANKING LAW OF KANSAS. — *Rhodes' Banking Journal* regards the new banking law of Kansas as worthy of careful consideration on account of the very liberal inducements it holds out to banking capital to make its home in that State. It says that the law seems to be founded upon the provisions of the National banking law and yet it departs from the spirit of that law in many important respects. One of the most radical points of difference is the very small amount of capital required to establish a bank viz.: "not less than five thousand dollars" The smallest capital alowed by the National banking law is $50,000, and this is the minimum only in places with six thousand inhabitants or less. One hundred thousand dollars is the minimum limit in places of greater population. Probably the idea of the Kansas legislature in making this small capital sufficient was to counteract the cry of monopoly which has been raised against the National system on account of the capital required, but the same charge of monopoly may be as justly raised against the Kansas law by those who deem $5,000 out of their reach. There is danger that a multitude of small banks will be organized, with all the attendant evil of disproportionate expenses and temptation to fraud. Moreover the par value of each share of stock is fixed at $100 so that to be a stockholder under the laws of Kansas requires as much capital as under those of the United States. The shareholders, so the act reads, "shall be additionally liable for the amount of stock owned and no more." Presumably this means that each shareholder shall be liable for the amount invested in his stock and an additional sum equal to the face value of the stock. The language of the law is, however, open to cavil, and it would have been better to have used the language of the National banking law fixing the double liability of the stockholder, inasmuch as this language has been interpreted and construed by the courts. There will be plenty of room for litigation in enforcing a stockholder's liability under the Kansas law. The penalty imposed on officers for making false statements or false entries in the books of the bank is ridiculously small being not to exceed a fine of $1,000 or not to exceed one year's imprisonment. The most fraudulent insolvency might thus go clear with a one dollar fine or impisonment for one day. The punishment of officers for receiving deposits when the bank is insolvent is much more severe being a fine not to exceed $5,000 or imprisonment not to exceed five years or both. Each bank is required to make four reports a year of its condition to the bank commissioner of the State, and the banks are to be carefully examined by the commissioner at least once a year.

BOOKS RECEIVED.

SUSPENSION OF THE POWER OF ALIENATION, and Postponement of Vesting, under the Laws of New York, Michigan, Minnesota and Wisconsin. With an appendix containing the corresponding Statutes concerning Suspension in the States of California, Idaho, Indiana, Iowa, Kentucky, North Dakota and South Dakota. By Stewart Chaplin, Counsellor at Law. New York: Baker, Voorhis & Company. 1891.

QUERIES.

QUERY NO. 7.

A offers documentary evidence on the trial of a case, and states in his offer that it is for the purpose of proving a certain fact, naming it. In the appellate court he seeks to use the document as proof of other facts. Can he use it as proof of facts not stated in his offer? S.

HUMORS OF THE LAW.

Perhaps the most disgusted man in Somerset county is a justice of the peace, who is the owner of a fine garden, the pride of his heart. The other day he was informed that an unruly cow had wrought desolation in his Eden, and he at once ordered the animal sent to the pound. Then he went up to view the wreck, and after noting the vacant places where the beets and corn had been, the trampled-down squashes and cabbages, and the demoralized pea-vines and sunflowers, and ascertaining, as he supposed, the owner of the

cow, he made out a writ against that individual, containing, so the *Fairfield "Journal"* is informed, fourteen different and distinct counts, including trespass, forcible entry, malicious mischief, nuisance, riotous and disorderly conduct, and assault and battery with intent to kill.

It was then that he learned that the trespasser was his own cow, and his ire cooled as he meekly paid a field-driver for getting her out of the pound.—*Lewiston (Me.) Journal.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE — Mutual Combat.—If both parties engage willingly in a personal recounter, it is a mutual combat or fight, and death resulting therefrom is not included in a policy of accident insurance which excepts from the risk death or injury which may have been caused by fighting. It makes no difference, in such case, whether the slayer was sane or insane.—*Gresham v. Equitable Life & Acc. Ins. Co.*, Ga., 13 S. E. Rep. 752.

2. ADMINISTRATION—Sale of Decedent's Land.—Under How. St. Mich. § 6025, which empowers an administrator or executor to obtain a license for the sale of his decedent's realty for the payment of debts, if the personalty "in the hands of the executor or administrator" is insufficient for that purpose, a petition by an administrator *de bonis non*, appointed on the removal of the original administrator, which alleges that there are just debts and charges against the estate, and that no personalty came into the hands of the administrator *de bonis non*, is sufficient, without also alleging that there is an insufficiency of personal assets in the original administrator's hands.—*Beniteau v. Dodsley*, Mich., 50 N. W. Rep. 110.

3. ADMINISTRATOR'S SALE—Jurisdiction — Collatteral Attack.—Where the widow, residing in Massachusetts, of an intestate who died in Iowa, indorsed upon an account presented by the intestate's brother, who was also his administrator in Iowa, a certificate that the claim was just and true, and that the estate in Iowa should be sold to pay the same, she thereby submitted herself to the jurisdiction of the court ordering the sale, and cannot attack the validity thereof in a collateral proceeding.—*Bacon v. Chase*, Iowa, 50 N. W. Rep. 23.

4. ADVERSE POSSESSION—What Constitutes.—Where a statute requires, as an element necessary to give title by limitation, peaceable and undisputed possession of lands or tenements for a stipulated time, it is not required that a person shall have his feet on every square foot of ground, in order that it may be said under the law he is in possession. If he does that with reference to property of that kind which men usually do with their own, such as improving it, or using it for any purpose, that is possession, although the person may not live on it. The control, management, and direction that he may take with reference to the property, although he has never been on it, where it is under his control, management, and direction, may be sufficient to establish possession.—*Latta v. Clifford*, U. S. C. C. (Colo.), 47 N. W. Rep. 614.

5. APPEAL—"Exception Taken"—The words "exception taken," appearing in the bill of exceptions following a ruling by the judge, will be presumed to have been taken at the time the ruling was made, and by the party against whom it was made.—*Hall v. Harris*, S. Dak., 50 N. W. Rep. 98.

6. APPEAL — Failure to File Transcript.—Where the appellants fails to file in the supreme court, within the time required by law, a transcript of the proceedings of the lower court subsequent to a decree of the former court in the cause, there being a stipulation that the transcript on the former appeal shall be used for all purposes necessary to the second, and good cause for the laches is not shown, the appeal will be dismissed on motion of the appellee, and damages be allowed as for an appeal taken merely for delay.—*Long v. Herrick*, Fla., 10 South. Rep. 17.

7. APPEAL—Record—Special Findings.—Rev. St. Ind. 1881, § 546, provides that the court shall, at the request of either party, direct the jury to give a special verdict in writing on any or all of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing; which special finding is to be recorded in the record: *Held*, that where the record contains special findings, and shows that the parties requested them, it will be presumed, on appeal, that the court instructed and required the jury to answer them, and therefore the findings are properly in the record.—*Shoner v. Pennsylvania Co.*, Ind., 28 N. E. Rep. 616.

8. ARBITRATION—Award—Res Judicata.—Where, in an action to recover for labor and material furnished in the erection of a building, after defendants have answered, counter claiming damages for fraud and misrepresentation in relation to such building, the subject-matter of the action is submitted to arbitration, and an award is found in favor of defendants, it is a bar to any future action against plaintiffs for such fraud.—*Baltes v. Bass Foundry & Machine Works*, Ind., 28 N. E. Rep. 319.

9. ASSIGNMENT OF BENEFIT CERTIFICATE—Gift. — A nominal partner in a banking firm, without the knowledge of his copartners, withdrew moneys from the bank, and loaned them to to his son, who lost them in his business, and shortly afterwards died, leaving a benefit certificate payable to his wife. At the father's urgent solicitations, the wife, by written assignment, transferred the certificate to him, in order to assist him in replacing the funds of the bank, and the benefit society paid the proceeds to him. The wife repudiated the assignment, and sued the society: *Held* that, in the absence of fraud, duress, or undue influence, mere want of consideration, other than that mentioned, did not render the transfer void, as it was sustainable as a gift, made perfect by the written assignment.—*Gary v. Northwestern Masonic Aid Ass'n*, Iowa, 50 N. W. Rep. 27.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of assignment, conveying land for the benefit of creditors, made in 1857, was void upon its face when it declared preferences in favor of certain of the assignor's creditors, but failed to name such preferred creditors in the body of the instrument or in schedules thereto attached.—*Wolf v. O'Connor*, Mich., 50 N. W. Rep. 118.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where, after an assignment is made to a sheriff for the benefit of the creditors of the assignor, the creditors choose an assignee to succeed the sheriff in such trust, who

qualified by entering into an undertaking as required by law, it is the duty of the sheriff to immediately execute and deliver to such assignee a deed of quitclaim of all real estate conveyed by the assignment, and in default thereof *mandamus* will lie to enforce the performance of the duty.—*Strunk v. State*, Neb., 50 N. W. Rep. 14.

12. ATTACHMENT—Burden of Proof. — Where the affidavit supporting the petition for an attachment issued on the ground of fraud is not positive, but only "to the best of affiant's knowledge and belief," the burden of proof on the hearing of an application to dissolve the attachment is upon the plaintiff.—*Kenny v. Wallace*, Ga., 13 S. E. Rep. 744.

13. ATTACHMENT—Commencement of Action.—An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served.—*Coffman v. Brandhoeffer*, Neb., 50 N. W. Rep. 6.

14. ATTACHMENT—Sale of Wife's Property.—In Pennsylvania, where property in possession of the husband is lawfully seized and sold under execution against him in favor of his creditors, his wife, unless she shows that the property was paid for out of her separate estate, cannot, on the ground that she owned it, recover against the execution creditors, or the officer who made the seizure and sale.—*Bolinger v. Gallagher*, Penn., 22 Atl. Rep. 815.

15. BAILMENT — Loss by Fire — Liability of Bailee.—Plaintiff and his assignors delivered milk at defendant's factory to be manufactured into cheese and butter, and marketed, and the proceeds deposited by him for them, respectively, at a stipulated compensation. The factory and its contents were destroyed by fire, and plaintiff brought an action for the loss to himself and his assignors, alleging that the fire was occasioned by defendant's negligence: *Held*, that the contract was one of bailment, and, the cause of the loss appearing from the complaint, the burden of proof was on plaintiff to show negligence. Plaintiff could not recover as for breach of contract; for it affirmatively appeared by the complaint that performance was rendered impossible by the destruction of the property, the subject of the contract.—*Stewart v. Stone*, N. Y., 28 N. E. Rep. 595.

16. CHATTEL MORTGAGE— Sufficiency of Description.—The tenant of a farm, rented under a lease reserving as rent one-third of the crops, mortgaged his "undivided two-thirds interest in any and all crops grown or to be grown" on said farm for a certain year: *Held*, that the description of the mortgaged property was sufficiently definite.—*Johnson v. Ridir*, Iowa, 50 N. W. Rep. 36.

17. CONSTITUTIONAL LAW—State Board of Agriculture.—Act Ind. March 4, 1891, abolishing the State board of agriculture, and transferring all its property to another institution, is unconstitutional, since said State board, though organized under Act Feb. 14, 1851, for the public benefit, is a private corporation.—*Downing v. Indiana State Board*, Ind., 28 N. E. Rep. 614.

18. CONTRACT—Necessity of Demand.—When a note or contract for a sum certain is payable in specific articles of personal property, but no time or place is designated in the note or agreement for the payment, a demand must be made by the creditor of the debtor for payment of the specific articles, and refused, before the creditor is entitled to recover the amount of the note or contract in money.—*Cosand v. Bunker*, S. Dak., 50 N. W. Rep. 84.

19. CONTRACT—Reformation.—A person is entitled to reformation of a written contract intended to evidence a previous oral one, if his agent, in drawing it up, has made it contain terms not contemplated by the parties, though the agent thought such terms intended, and intentionally embodied them in the contract.—*Linton v. Unexcelled Fire-works Co.*, N. Y., 28 N. E. Rep. 580.

20. CONVERSION—Pleading—Facts Admitted.—A complaint in an action, in which it is alleged that at a certain time the plaintiff was the owner and in the possession of certain personal property; that it came into the possession of the defendants; and that, while so in their possession, they unlawfully and wrongfully converted it to their own use, to the damage of plaintiff—is sufficient under the Code of this State. The further allegation that defendants "took possession of said personal property" should be treated as surplusage.—*Humpfner v. D. M. Osborne & Co.*, S. Dak., 50 N. W. Rep. 86.

21. CORPORATIONS—Right to do Business in a State.—Comp. St. Mont. 1888, § 442, p. 720, requiring foreign corporations, before doing business in the State, to file, in the office of the recorder of the county wherein it intends to carry on business, a copy of its charter, and certain verified statements as to its capital, does not prevent a foreign trust company which has not complied therewith from purchasing securities of a railroad company in the State, and taking a mortgage upon its property to secure them, since such isolated act is not doing a business in the State.—*Gilchrist v. Helena, etc. R. Co.*, U. S. C. C. (Mont.), 47 Fed. Rep. 593.

22. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—On a trial for homicide, the testimony showed that defendant shot deceased just after the latter had committed an unwarranted assault on a third person, and, as defendant's evidence showed, just as deceased was in the act of drawing a pistol on defendant: *Held*, that declarations made by deceased just before his death, two days after the shooting, that he had brought on the difficulty himself, and that he was wholly to blame, were admissible as dying declarations in defendant's favor.—*Brock v. Commonwealth*, Ky., 17 S. W. Rep. 337.

23. CRIMINAL LAW—False Pretenses.—Under Rev. St. Mo. 1879, § 1335, punishing, as for a felonious stealing, any person who, with intent to cheat or defraud another, shall agree or contract for the purchase of property "to be paid for upon delivery," and, after obtaining possession, shall secrete or dispose of the same without "paying or satisfying" the owner, etc., therefor, where, by the contract of purchase, set out in the indictment, the purchaser was to give notes and a mortgage for the purchase price, the indictment must charge a failure to perform such condition. An allegation that the purchaser disposed of the property without "paying" therefor states a mere conclusion, and is not sufficient on demurrer.—*State v. Daggs*, Mo., 17 S. W. Rep. 306.

24. CRIMINAL PRACTICE—False Pretenses.—Variance.—As the constitutionality of the form of indictment under Rev. St. Mo. 1879, § 1561, making it a felony to obtain money, etc., by means of bogus checks, false pretenses, etc., is only upheld on the ground that the name of the person defrauded is required to be set forth therein, a variance between an indictment in the words of the statute and proof as to the person defrauded is fatal, and is not cured by section 1820, which provides that a variance between the indictment and proof as to the name of any person therein set forth is not ground of acquittal unless the court before trial find it material or prejudicial.—*State v. Reynolds*, Mo., 17 S. W. Rep. 322.

25. CRIMINAL PRACTICE — Murder—Sentence.—Under Act Ky. March 30, 1890, a judgment sentencing a prisoner to death need not name the hour on which the execution is to take place, as this is purposely left to the discretion of the sheriff; nor need the judgment direct the sheriff to erect an inclosure, as this is made obligatory on him by the statute.—*Puckett v. Commonwealth*, Ky., 17 S. W. Rep. 335.

26. DEED — Appurtenant Easement.—The owners of land fronting on the Mississippi river conveyed a lot which lay a quarter of a mile from the river front, a portion of the land being between it and the river. The deed recited that the lot was conveyed, "together with the free use of the river front," and described the land as part of the R place. The grantee bought the lot to

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get the privilege of using the river front: *Held*, that the privilege of using the river front was appurtenant to the lot.—*Weis v. Meyer*, Ark., 17 S. W. Rep. 339.

27. DEED — Construction — Artificial Boundaries.—When an authenticated plat of land is referred to in a deed conveying a portion of the tract it becomes as much a portion of the deed as if fully incorporated in it.—*Whitehead v. Ragan*, Mo., 17 S. W. Rep. 307.

28. DEED—Delivery—Instructions.—On an issue as to the delivery of a deed to defendant from his father, which was found among the father's papers on his death, an instruction that, if the father, during his lifetime, kept the deed in a place to which the defendant had access, "yet that fact of itself was not sufficient to constitute delivery. The intention to deliver must be proved by some word or act of the grantor"—is not erroneous as a comment on the evidence.—*Tyler v. Hall*, Mo., 17 S. W. Rep. 320.

29. DEED TO LAND BORDERING ON RIVER.—Land bordering on the Mississippi river having been submerged for some distance above the low-water mark by means of dams erected in the river, the owner conveyed in fee all such submerged land: *Held*, that the conveyance also included the riparian rights which were naturally incident thereto, among which was the right to accretions formed by gradual alluvial deposits beyond the line of low water, notwithstanding the fact that the deed also in terms granted certain easements and rights upon the shore, which may be regarded as applicable to the remaining lands of the grantor bordered by the submerged land conveyed.—*Minneapolis Trust Co. v. Eastman*, Minn., 50 N. W. Rep. 82.

30. DEPOSITION.—Where a deposition *de bene esse* has been taken upon short notice under section 25 of the act concerning evidence, the reasons for the taking of the same, and the requirement of the commissioner in respect to the notice, together with a copy of the notice itself, can appear only by the certificate of the commissioner. Oral proofs offered before the trial court were properly rejected.—*Chase v. Garreston*, N. J., 22 Atl. Rep. 787.

31. DOWER—Rights of Widow.—Under dower is assigned the right of a widow in the land of her husband is a mere chose in action.—*Pollitt v. Kerr*, N. J., 22 Atl. Rep. 800.

32. EJECTMENT—Improvements.—In an action for the recovery of real estate upon which permanent improvements have been made by a defendant, it must be shown that he holds his possession under color of title, and that the improvements were made in good faith, before he will be entitled to the value of such improvements.—*Wood v. Conrad*, S. Dak., 50 N. W. Rep. 95.

33. ELECTIONS—Ballots—Designation of Party.—In a division of a party convention of electors, where both divisions nominate candidates for city officers, and certify the names to the election commissioners, it is their duty to place upon the ballot the names of the candidates certified by the committee of either branch of the convention, and, if the name of the same party be certified by each committee, it shall be placed on the ballot as certified without further designation.—*Shields v. Jacob*, Mich., 50 N. W. Rep. 105.

34. EMINENT DOMAIN—Waiver.—Where a railroad enters upon the land of another in the course of its construction, and builds its road and road-bed, without opposition, upon the same, and the party makes no objection for several years, his act will be construed into a waiver. His claim against the road must be for compensation at the domicile of the company. He does not abandon his claim for compensation by the tacit waiver.—*Payne v. Morgan's etc. S. S. Co.*, La., 10 South. Rep. 20.

35. EQUITY—Relief against Judgment — Accident.—A defendant in a judgment at law, who has a defense which he might have successfully at law, had he had an opportunity to set it up, but who was prevented from doing so by accident, unmixed with negligence or fraud on his part, may still have the benefit of his defense by suit in equity.—*Herbert v. Herbert*, N. J., 22 Atl. Rep. 789.

36. EVIDENCE—Custom.—Where the employee whose business it was to place a stool used for the purpose of assisting lady passengers to enter the train was not produced or accounted for, there was no error in rejecting evidence that it was the custom and habit of the company to have the stool in its proper place up to the time of the starting of the train, there being positive evidence in behalf of the plaintiff that it was out of place when he was injured, and only negative evidence to the contrary in behalf of defendant.—*Atlanta & W. P. R. Co. v. Holcombe*, Ga., 13 S. E. Rep. 751.

37. EXECUTORS — Setting Aside Forged Mortgage.—Under Laws N. Y. 1858, ch. 314, giving to the executor or administrator, of an estate a right of action against any person who in fraud of creditors shall have received, taken, or "in any manner interfered with" the estate, property, or effects of the deceased, an action will lie to set aside and cancel, as fraudulent and void as to creditors, a mortgage of record, purporting to have been executed by a deceased debtor, which in fact was forged; and where the executor, or administrator refuses to bring the action on demand of the creditor the creditor may bring it, making such person a party defendant.—*National Bank v. Levy*, N. Y., 28 N. E. Rep. 592.

38. EXECUTORS AND ADMINISTRATORS—Allowance of Claim.—A claim against a decedent's estate was indorsed by the administrator, "Examined and found correct," and was entered in the probate index but with no statement therein as to the date or amount of the allowance. The administrator's report showing his approval of the claim, was afterwards approved by the clerk: *Held*, that the claim was not properly allowed, since it was not allowed by the clerk as required by Code Iowa, § 2408, and the administrator's written admission did not appear to have been made with the appropriation of the court, as required by section 2410, *Id.*—*Byer v. Healy*, Iowa, 50 N. W. Rep. 70.

39. FEDERAL COURTS—Circuit Court of Appeals—Certifying Case.—The decision of the United States Supreme Court in Wan Shing v. U. S., 140 U. S. 424, 11 Sup Ct. Rep. 729, that no Chinese merchant formerly residing in the United States, but temporarily absent therefrom, is entitled to return without presenting the certificate prescribed by section 6 of the exclusion act (22 St. ch. 126), is conclusive upon the circuit court of appeals, and that court will not certify a like case to the supreme court for instructions.—*Lau Ow Bow v. United States*, U. S. C. C. of App. 47 Fed. Rep. 641.

40. FEDERAL COURTS — Following State Decisions—Dower.—The federal court in Montana is bound by the decision of the supreme court of the State, holding that Laws Mont. 1876, p. 63, § 1, which gives a widow as dower one-third of all lands of which her husband was seised of an estate of inheritance during the marriage, unless the same has been relinquished by her, is still in force, although the federal court is of a different opinion, because said law does not appear in the Compiled Statutes, and because of the provisions of the statute of succession (section 534, p. 395), embodied therein.—*Black v. Elkhorn Min. Co.*, U. S. C. C. (Mont.), 47 Fed. Rep. 600.

41. FRAUDS, STATUTE OF—Oral Agreement to Answer for Debt of Another.—One employed by a contractor to dredge a river, so as to enable the contractor to lay a gas main across the river a private corporation, who is expressly informed by the corporation that he is working for the contractor, and who, after the completion of his work, sues the contractor for his bill, and garnishes the corporation, which action is still pending and undetermined, cannot enforce an alleged oral guaranty of his claim by the corporation, as such guaranty is void under the statute of frauds, as being an oral agreement to answer for the debt or default of another.—*Dupuis v. Interior Construction & Improvement Co.*, Mich., 50 N. W. Rep. 103.

42. FRAUDS, STATUTE OF — Oral Agreement.—Under Code Iowa, § 36075 (statute of frauds), evidence of a ver-

bal contract for the sale of land is admissible in evidence when such agreement is accompanied by a part payment of the purchase money.—*Pressley v. Roe*, Iowa, 50 N. W. Rep. 44.

43. FRAUDULENT CONVEYANCES — Partnership. — A mortgage of firm property by an insolvent firm to secure two distinct debts, one a firm debt and the other an individual debt of one of the partners, is, when no actual intent to defraud is shown, good to the extent of the firm debt secured by it.—*Smith v. Smith*, Iowa, 50 N. W. Rep. 64.

44. GAMING—Recovery of Money Lost in Dram shop.—Under Manef. Dig. Ark. § 4516, requiring each applicant for a dram-shop license to give bond that he will pay to any person all such sums of money as may be lost at gaming in his saloon, and section 4518, providing that any person who may have lost any money or other valuable thing at gaming in said dram-shop may have an action on said bond for the recovery thereof, a person cannot recover on the bond for money embezzled from him by an employee, and bet and lost by the employee on his own account in the dram-shop.—*Grant v. Owens*, Ark., 17 S. W. Rep. 338.

45. GUARDIANS—Deposits in Bank. — A guardian deposited the moneys of his ward, as a guardian, and not for his personal account, in a bank, which he was informed was solvent, and which, as a prudent business man, he had no reason to believe insecure; such deposit being temporary only, awaiting an opportunity for investment: *Held*, the bank having failed, that the guardian and his sureties were not liable for the loss.—*In re Law's Estate*, Penn., 22 Atl. Rep. 831.

46. GUARDIANS — Investment of Ward's Money.—A guardian loaned money of his ward to a firm of which such guardian was a member, and the ward, when he came of age, elected to receive a share of the profits of this firm, instead of interest on the money. It was shown that the guardian made the loan in good faith, for the sole purpose of obtaining a higher rate of interest, and that he profited nothing thereby, for the loan excluded a like amount of his own capital from the same profitable investment: *Held*, that the ward must bear his proportion of the losses of the firm if he would share in the profits.—*Appeal of Small*, Penn., 22 Atl. Rep. 809.

47. HOMESTEAD.—A debtor with a family may move upon land in good faith and make a home of it, and thereby acquire a homestead, although his indebtedness was created prior to the time of his moving, but not if created prior to the purchase of the land or the erection of the improvements.—*Hensey v. Hensey's Adm'r*, Ky., 17 S. W. Rep. 333.

48. HOMESTEAD—Sale—Investing Proceeds.—The proceeds of sale of an Iowa homestead lose their distinctive character when invested in another State, and no exemption attaches to land afterwards purchased in Iowa with the proceeds of sale of the land in such other State.—*Dalton v. Webb*, Iowa, 50 N. W. Rep. 58.

49. HUSBAND AND WIFE—Competency as Witnesses.—In civil actions, other than divorce cases, as the law stood in this State after the legislation of January, 29, 1885, and before the act of June 4, 1891, a husband was, on account of the marital relation, not a competent witness either for or against his wife, but the wife was a competent witness for or against a husband in a case where he was a party and could himself testify; and the disqualification of the husband, as such, to testify for or against his wife did not of itself disqualify him from testifying as to his own interest where they were both parties, nor did such relation disqualify her from testifying as to her interest in the case.—*Haworth v. Norris*, Fla., 10 South. Rep. 18.

50. INJUNCTION—Waste of Assets by Chattel Mortgagor.—When a merchant on the day after the execution of a mortgage on his stock of goods in favor of some of his creditors disposes of a large amount of them to other creditors in payment of their debts, a court of equity is justified in enjoining him from selling said goods otherwise than for cash, and commanding him to pay the proceeds, after deducting expenses of sale, into the registry of the court.—*Logan v. Slade*, Fla., 10 South. Rep. 25.

51. INSANITY—Costs.—The law will imply an obligation enforceable as a claim against a lunatic's estate after his death to pay for services rendered by an attorney in an unsuccessful application on his part to supersede an inquisition, where the proceedings were fair, and not vexatious or groundless, and where the lunatic died before the power of the court in the original proceedings to settle the question of allowance was definitely invoked.—*Carter v. Beckwith*, N. Y., 28 N. E. Rep. 582.

52. INSURANCE—Condition in Policy.—The execution of a chattel mortgage on partnership property by one of the partners to secure his individual debt works a change of "interest" in the property, within the meaning of a policy of insurance placed thereon by the partnership, which provides that the policy shall become void, if any change, other than by death, of the insured, takes place in the "interest, title, or possession" of the property insured.—*Olney v. German Ins. Co.*, Mich., 50 N. W. Rep. 100.

53. INSURANCE—Payment of Premiums.—Laws Iowa 1880, ch. 210, provides for notice to an assured by the company of the maturity of his premium note, and declares that "such notice may be served either personally or by registered letter addressed to the assured at his post-office address named in or on the policy, and no policy of insurance shall be suspended for non payment of such amount until 30 days after such notice has been served:" *Held*, that service was complete, and the 30 days begin to run as soon the letter is mailed as provided by law.—*Ross v. Hawkeye Ins. Co.*, Iowa, 50 N. W. Rep. 47.

54. INTOXICATING LIQUORS — Local Option.—A town election to determine whether liquor licenses shall be issued is not rendered void by the facts that a separate ballot box was not provided for the votes cast upon that question, and that such votes were placed in the official envelopes, since the only statutory requirement as to such voting is that it shall be by ballot.—*Donovan v. Commissioners of Fairfield County*, Conn., 22 Atl. Rep. 847.

55. JUDGMENT—Lien.—Rev. St. Ind. § 611, which provides for the filing of a certified copy of a judgment in a county other than that in which it was rendered, and declares that "such judgment from the time of filing the copy aforesaid, shall be a lien on all the real estate of the judgment debtor situated in the county where filed as fully as if judgment had been rendered thereon," creates no new lien; and the lien on the land in such county expires in 10 years from the rendition of the judgment, as provided by section 608.—*Bradfield v. Newby*, Ind., 28 N. E. Rep. 619.

56. JUDGMENT—Setting Aside—Waiver.—Under Code Iowa, § 3154, which authorizes the district court to vacate a judgment after the term, "for unavoidable casualty or misfortune preventing the party from prosecuting or defending," it is not an abuse of discretion to set aside a judgment by default a year after it was rendered, upon a showing that the default was entered when defendant's attorney was too ill to attend court or to advice his client, and that defendant was a non-resident, and did not know of the default until after the term preceding the one at which he applied to set it aside.—*Callahan v. Ætna Nat. Bank*, Iowa, 50 N. W. Rep. 69.

57. JUDGMENT BY DEFAULT.—Where an action is commenced by declaration in the circuit court, and the declaration, with notice of the rule to plead, is personally served on defendants, judgment by default may be entered after the expiration of 20 days from the service, without making or filing an affidavit of the non-appearance of defendants, as the court takes judicial notice from the records that no appearance has been entered and no plea filed by defendants.—*Edson v. La Londe*, Mich., 50 N. W. Rep. 112.

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58. JUDGMENT LIEN—Equitable Title.—A judgment is not a lien upon land of which the judgment debtor holds only the naked legal title, where the fact that a third person owns the equitable title, though not disclosed by the record, is known to the judgment creditor.—*Brebner v. Johnson*, Iowa, 50 N. W. Rep. 35.

59. LIBEL—Pleading-Innuendo.-It is the rule in actions for libel that words or phrases which on their face appear to be entirely harmless may, under certain circumstances, convey a covert meaning wholly different from an ordinary and natural interpretation. Such words or phrases may be rendered actionable by alleging, among other things, that the author intended them to be understood, and that in fact they were understood, in the covert sense by those who read them.—*Glatz v. Thein*, Minn., 50 N. W. Rep. 127.

60. MARRIED WOMEN—Confession of Judgment.—Under the Pennsylvania "Married Persons' Property Act" of June 3, 1887, which authorizes a married woman to contract as a *feme sole* for the purposes of carrying on trade, managing her separate estate, supplying herself with necessaries, a judgment confessed by a married woman in furtherance of these purposes is valid.—*Appeal of Koechling*, Penn., 22 Atl. Rep. 808.

61. MASTER AND SERVANT—Fellow Servants.—Where a foreman in the employ of a railroad company acts as a vice-principal in calling out all its employees to avert the threatened destruction of a bridge by the accumulation of drift in a freshet, he does not cease to be such vice-principal and become a fellow-servant as soon as he has assigned to the other employees a place to work, but retains his original character while directing the details of the work.—*Nall v. Louisville, etc. Ry. Co.*, Ind., 28 N. E. Rep. 611.

62. MECHANICS' LIENS—Filing Statement.—In the case of mechanics' liens accruing before or after October 1, 1889, when the law passed that year went into effect, the matter of the statement, both as to its contents and the time for filing it, must be controlled by the law in force when the lien accrued. The part of each judgment appealed from reversed.—*Hill v. Lovell*, Minn., 50 N. W. Rep. 81.

63. MECHANICS' LIENS—Stipulation Against, in Contract.—A building contract provided that the owner should not "in any manner" be answerable for any of the materials used in finishing and completing the building, and that there should not be any lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said building: *Held*, that the contract provided against the filing of mechanics' liens, and was binding on subcontractors.—*Dersheimer v. Maloney*, Penn., 22 Atl. Rep. 813.

64. MINES AND MINING—Negligence in Mining Coal.—The lessor of coal lands is *prima facie* not liable to the owner of the surface for damages caused by the lessee's negligence in mining and taking out coal.—*Hill v. Pardee*, Penn., 22 Atl. Rep. 815.

65. MORTGAGE — Acknowledgment — Foreclosure. — Under How. St. Mich. § 5660, where the assignment of a mortgage, executed in another State, is acknowledged before a person as a notary public, but contains no certificate that he was a notary public, it is not entitled to record, and if recorded cannot support a foreclosure by advertisement, since under the statute allowing such mode of foreclosure the assignment and mortgage must be entitled to record as well as recorded.—*Dohm v. Haskin*, Mich., 50 N. W. Rep. 108.

66. MORTGAGE — Deed Absolute on Its Face.—Defendant was applied to for a loan to complete the payment of the purchase money of land, and in response instrusted a check to his wife for the amount desired, instructing her not to use it unless the proposed borrower should consent to an absolute sale of the land, with the privilege to him of remaining on the land by sufferance. Plaintiff refused to accept the loan on those terms, whereupon defendant's wife loaned the money, without insisting upon such condition, but took an absolute conveyance of the land to plaintiff instead of a mortgage: *Held*, in an action to declare the conveyance a mortgage, that defendant was bound by the action of his wife in transegressing his authority in making the loan.—*Cobb v. Day*, Mo., 17 S. W. Rep. 328.

67. MUNICIPAL CORPORATIONS— Annexing Territory.—Under Rev. St. Tex. art. 503, providing that whenever a majority of the qualified voters of any territory adjoining the limits of any city, to the extent of a half mile in width, shall "vote" in favor of becoming a part of the city, any three of them may make affidavit to the fact, to be presented to the council, and the council may, by ordinance, receive them as part of the city, the vote need not be by ballot, but may be by any method satisfactory to themselves and the council.—*State v. City of Waxahachie*, Tex., 17 S. W. Rep. 348.

68. MUNICIPAL CORPORATIONS-Change of Street Grade.—A city having changed the established grade of a street where it crossed another street, and damages having been assessed and paid, in accordance with the charter, for the injury resulting therefrom to a lot fronting on the latter street, the city is held not to be again liable to the owner of such lot by reason of the fact that such change of grade had cut off all access thereto.—*Keil v. City of St. Paul*, Minn., 50 N. W. Rep. 83.

69. MUNICIPAL CORPORATIONS — Contributory Negligence.—In an action for personal injuries caused by defendants' negligence, an instruction that plaintiff cannot recover if he was guilty of any negligence which "materially" contributed to the injury is erroneous, the rule being that any negligence on his part will preclude his recovery.—*Mattimore v. City of Erie*, Penn., 22 Atl. Rep. 817.

70. MUNICIPAL CORPORATIONS—Debts and Liabilities.—When a city of the second class becomes a city of the first class, it retains all its vested rights with regard to its property and contracts, and remains responsible with regard to all its existing liabilities and obligations, whether upon contract or otherwise, but its mode of government is changed.—*Manley v. Emlen*, Kan., 27 Pac. Rep. 844.

71. MUTUAL BENEFIT ASSOCIATIONS.—An association organized under the general incorporation laws of the State, the principal object and functions of which are to secure to each member thereof the payment on his death, to his beneficiary or representative, of a certain sum of money, subject to the fulfillment of the conditions imposed by the charter and by-laws, is essentially a life insurance company, and the relations between such companies and the members are purely business relations, based upon contract.—*Masonic Aid Ass'n v. Taylor*, S. Dak., 50 N. W. Rep. 93.

72. MUTUAL BENEFIT SOCIETY—Waiver of Conditions.—Where a benefit society, which has issued a certificate conditioned to be void if the beneficiary is not a "natural heir" of the member, continues to collect assessments after knowledge that the beneficiary named is not related to the member, there is a waiver of the condition, and the policy is valid.—*Lindsey v. Western Mut. Aid. Soc.*, Iowa, 50 N. W. Rep. 29.

73. NEGOTIABLE INSTRUMENT — Fraud — Bona Fide Purchasers.—The burden is on the holder of a negotiable note to show that he was a *bona fide* purchaser, where the maker, in an action against him, has shown that it was obtained from him by fraud.—*Joy v. Diefendorf*, N. Y., 28 N. E. Rep. 602.

74. NEGOTIABLE INSTRUMENT —Lost Notes. — In an action on a note made by defendant to the order of two others and by them indorsed to plaintiff, plaintiff proved that when the note fell due one of the indorsers took it up, giving plaintiff in lieu of it a note made by one L, with the same indorsers; that this note proved to be a forgery, though plaintiff had believed it genuine, and that said indorser had fled the country, and plaintiff was ignorant of his whereabouts: *Held*, that this was sufficient to excuse non-production of the note, and to justify secondary evidence of its contents. —*West Philadelphia Nat. Bank v. Field*, Penn., 22 Atl. Rep. 829.

75. NEGOTIABLE INSTRUMENT — Note— Assignment.—The transfer of a promissory note by indorsement operates as an assignment or transfer of a bill of sale given to secure its payment, and the owner of the note, in a proper case, may bring replevin in his own name to recover possession of the property covered by the bill of sale.—*Gamble v. Wilson*, Neb., 50 N. W. Rep. 3.

76. NEW TRIAL—Cumulative Evidence.— Where, on trial for slander in charging a minister of the gospel with lewdness, evidence was given of certain facts tending to show lewdness, newly-discovered evidence of other facts tending to show lewdness is not cumulative.—*Boggess v. Read*, Iowa, 50 N. W. Rep. 43.

77. NUISANCES—Cities.—Under Code Iowa, § 456, providing that incorporated towns shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated, a city has no authority to pass an ordinance imposing a fine for the maintenance of a nuisance.—*City of Knoxville v. Chicago, etc. R. Co.*, Iowa, 50 N. W. Rep. 61.

78. PARENT AND CHILD — Contract for Support of Mother.—In an action by a daughter for money expended in the support of her aged mother, under an express promise by defendant, the mother's brother, to reimburse her therefor, an instruction that defendant must have received a valuable consideration from plaintiff to render the promise binding on him is explained, as to the sufficiency of the consideration to support the promise, by a further instruction that plaintiff is entitled to recover if defendant was desirous of aiding in the support of his sister, and agreed with plaintiff as an individual, to reimburse her for the charges and expenses incurred by her in that behalf.—*Howe v. Hyde*, Mich., 50 N. W. Rep. 102.

79. PRINCIPAL AND SURETY — Accounting Between Sureties.—Where two persons become bound as sureties at the same time, and upon the same instrument, security obtained by one of them from the debtor, without the knowledge or consent of his co surety, inures equally to the benefit of both the sureties.—*Hoover v. Mowrer*, Iowa, 50 N. W. Rep. 62.

80. PUBLIC LANDS— Grants. — The act of congress granting land to the Northern Pacific Railroad Company to aid in the construction of its road granted every alternate section of public land, not mineral, designated by odd numbers, for a certain distance on each side of the line it might adopt, to which the United States had title, not reserved, sold, granted, or otherwise appropriated, and free from pre emption or other claims or rights "at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office," and directed that the president should cause the lands to be surveyed on both sides of the line of the road "after the general route should be fixed." Section 6 declared that the odd sections thereby granted could not be liable to "sale or entry or entry or pre-emption" before or after such survey, except by the company: *Held*, that the act did not reserve said sections from subsequent entry before the line of the road was definitely fixed by filing a map thereof with the commissioner of the general land-office.—*Northern Pac. R. Co. v. Sanders*, (U. S. C. C.), Mont., 47 Fed. Rep. 604.

81. PUBLIC LANDS—Swamp Lands.—The swamp-land act (Act Cong. Sept. 28, 1850), included in its grant to the States "the whole of those swamp and overflowed lands made unfit thereby for cultivation" which remained unsold at the passage of the act, covering "all legal subdivisions the greater part of which is unfit for cultivation:" *Held*, that the fact that land claimed under this act may be sowed in grass, and mowed from year to year, does not prove it fit for cultivation, but the test of that fitness is whether it is arable, and adapted to raising crops requiring annual planting and tillage.—*American Emigrant Co. v. Rogers Locomotive Machine Works*, Iowa, 50 N. W. Rep. 52.

82. QUIETING TITLE—Adverse Possession. — Adverse possession for the statutory period, under contract of sale made by the husband, will support a suit to quiet title against the wife, who claims homestead rights in the land because she did not join with her husband in the contract to convey.—*Boling v. Clark*, Iowa, 50 N. W. Rep. 57.

83. RAILROAD COMPANIES—Negligence.—In an action against a railroad company, a complaint which alleges that defendant negligently allowed one of the ties in its track in a certain yard to become split, so that plaintiff's intestate, without any knowledge of the condition of this tie, had his foot caught in the cleft, and was in consequence run over and killed, while in the discharge of his duties as a switchman, states a cause of action; there being nothing therein to show that it was any part of the intestate's duty to inspect the track for such defects, or that he had ever passed the place of the accident before that.—*Pennsylvania Co. v. Brush*, Iowa, 28 N. E. Rep. 615.

84. REPLEVIN—Action on Bond.—Where a person, as attorney for another, institutes a replevin suit, and signs the replevin bond as surety, thereby enabling plaintiff to obtain possession of the property, he cannot escape liability on the bond after a return of the property has been ordered, but not made, on the ground that it was void because no affidavit was filed with the justice before the writ of replevin was issued.—*Stimer v. Allen*, Mich., 50 N. W. Rep. 107.

85. RESTRICTIONS.—Defendants purchased a lot, with buildings on it, which had been erected years before in violation of a restriction in the deed. The grantor and his successors in interest were at all times in possession of the adjoining lot, but made no objections to the buildings: *Held*, that after such delay equity would not restrain the further maintenance of the buildings, but that plaintiff, who had succeeded to the grantor's interests in the adjoining lot, would be left to his remedy at law.—*Orne v. Fridenberg*, Penn., 22 Atl. Rep. 832.

86. SALE—Fraud—Bona Fide Purchasers. — A person who, without notice that his debtor had procured goods on credit by fraud, takes $4,900 worth of them in payment of a pre-existing debt of $4,100, and pays the balance of $800 in cash, is a *bona fide* purchaser, and will be protected in his purchase as against the debtor's vendor.—*Woolridge v. Thiele*, Ark., 17 S. W. Rep. 840.

87. SALE—Pleading and Proof.—In an action for the price of goods sold, defendants cannot, unless the defense is specially pleaded, show that, by agreement with plaintiffs, instead of buying the goods they held them as consignees to sell for and on account of plaintiffs.—*Wallace v. Blake*, N. Y., 28 N. E. Rep. 603.

88. SEDUCTION—Limitations.—The statute of limitations begins to run against an action for damages by a father for the seduction of his minor daughter from the time of the seduction, that being the cause of action, and subsequent results giving no new cause of action, but only affecting the damages.—*Dunlap v. Linton*, Penn., 22 Atl. Rep. 819.

89. SPECIFIC PERFORMANCE—Agreement for Exchange. —An agreement for the exchange of real estate, to be enforced specifically, must be mutual in its character and certain in its terms. These are indispensable requisites to the granting of relief. Where the testimony is conflicting as to the terms of a verbal contract for the exchange of lands, the finding of the court thereon will be upheld, unless it is clearly wrong.—*Cooper v. Chittenden*, Neb., 50 N. W. Rep. 2.

90. SPECIFIC PERFORMANCE—Decree—Abandonment.—One W brought an action against C for specific performance of a contract for the sale of land. He alleged in his petition that "on the 2d and 12th days of October, 1882, he paid the installments of both principal and interest due in three and four years after said last mentioned date at the office of Russell & Holmes," etc., and had duly performed the conditions of the contract on his part. The court rendered a decree of specific performance in his favor, whereupon he withdrew the money placed with Russell & Holmes for C.: *Held*, an

abandonment of the benefit of the decree.—*Cheney v. Wagner*, Neb., 50 N. W. Rep. 13.

91. STATUTES—Construction.—Where the first clause of a section in an act of the legislature conforms to the obvious policy and intent of the legislators, as elsewhere indicated in the act, itis not rendered inoperative and void by a later inconsistent clause which does not conform to this policy and intent. In such cases the later clause is nugatory, and must be disregarded.—*McCormick v. Village of West Duluth*, Minn., 50 N. W. Rep. 128.

92. STOCK AND STOCKHOLDERS — Subscription—Limitation.—The right of action on a subscription for stock will be deemed, with respect to the statute of limitations, to exist whenever the company may call for a payment of such subscription, and it will not be permitted, where it has failed to make such calls within the statutory period, to avail itself of its failure in the premises in order to defeat a defense of the statute.—*Great Western Tel. Co. v. Purdy*, Iowa, 50 N. W. Rep. 45.

93. SUPREME COURT—Jurisdiction in Banc.—A motion to transfer a cause to the supreme court *in banc* after decision rendered on the ground that one of the judges did not sit at the hearing, nor participate in the decision, must be denied, since the constitution of Missouri authorizes such transfer only "when the judge of the division dissents from the opinion therein, or when a federal question is involved."—*State v. Orrick*, Mo., 17 S. W. Rep. 329.

94. TAXATION OF RAILROADS.—Tolls received by one railroad company from another for the joint use of the track of the former, computed not upon the amount of the gross receipts, but at a certain specified sum per ton or per passenger, are not within Act Pa. June 1, 1889, which provides that a railroad company owning, operating, or leasing any railroad shall pay a tax upon the gross receipts "received from passengers and freight."—*Commonwealth v. New York, etc. R. Co.*, Penn., 22 Atl. Rep. 806.

95. TAX LIEN—Foreclosure.—The plaintiff on November 5, 1877, purchased certain real estate at tax sale, and on May 10, 1880, he surrendered the certificate of purchase, and received a tax deed for the land, which was invalid for defects apparent upon its face. On the 23d day of January, 1890, suit was instituted to enforce a lien for taxes paid: *Held*, that the action was barred.—*Warren v. Demary*, Neb., 50 N. W. Rep. 15.

96. TAX SALE—Jurisdiction—Order and Publication.—Act Ark. March 1, 1881, § 2, provides that, when a complaint for the enforcement of overdue taxes is filed, the clerk shall enter of record an order requiring all persons having any interest in the land to appear within 40 days, and show cause why a lien should not be declared on the land for the taxes and the lands sold therefor, and that he shall cause a copy of the order to be published, and that such publication shall be notice to the world of the contents of the complaint: *Held*, that the publication of a notice without the previous making of the order did not give the court jurisdiction.—*Gregory v. Bartlett*, Ark., 17 S. W. Rep. 344.

97. TRIAL—Peremptory Challenges.—Under How. St. Mich. § 7599, providing that the first 12 persons who shall be approved of as indifferent between the parties shall be sworn, and shall be the jury to try the case, the trial court cannot, in its discretion, after the panel has been sworn in a cause, permit either party to peremptorily challenge a juror, and have another drawn in his place, against the objections of the opposing party.—*Ayres v. Hubbard*, Mich., 50 N. W. Rep. 111.

98. TRIAL — Verdict against Instructions.—It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When they clearly violate this duty the court should set aside their verdict. The refusal of the court to do so upon proper application is reversible error.—*Omaha & R. V. Ry. Co. v. Hall*, Neb., 50 N. W. Rep. 10.

99. TRUSTS — Parol Evidence.—Where land has been conveyed to the ancestor by a deed absolute, for which the heirs have parted with nothing, parol evidence in their behalf is inadmissible to show that it was conveyed to him under an express agreement that he should only have a life estate, and should transmit the land to certain of these heirs at his death.—*Stonehill v. Swartz*, Ind., 28 N. E. Rep. 620.

100. UNITED STATES MARSHALS — Deputies—Powers Outside District.—The authority and powers of United States marshals and their deputies are confined to the districts for which they are appointed; and hence, where a deputy-marshal for the western district of Tennessee, while temporarily in Mississippi on private business, learns of the whereabouts of a person for whom he has a warrant of arrest, and thereupon conceals a pistol about his person preparatory to starting in pursuit, he is answerable to the Mississippi courts for the offense of carrying concealed weapons, and *habeas corpus* will not issue to effect his release.—*Walker v. Lea*, U. S. C. C. (Miss.), 47 Fed. Rep. 645.

101. WILL—Construction.—A will devised to testator's wife "all my property, real, personal, and mixed, absolutely, for her use and benefit during her life, to be used and disposed of in such manner as she sees fit; and at her death, if there remains any of said property," to his children in fee. Three years later he added a codicil, wherein, after reciting that he had given all his real estate to his wife, he declared that "I hereby modify my said bequest as follows;" naming certain lots comprising part of his real estate. "My said wife is to have said lots named during the time of her natural life," with remainder to certain grandchildren: *Held*, that the will gave the wife an estate in fee in all the real estate, and the codicil restricted it to a life-estate only as to the lots mentioned therein.—*Pellizzarro v. Reppert*, Iowa, 50 N. W. Rep. 19.

102. WILL—Construction. — Testator gave a son one of his farms "at $5,000," and to another son a farm "at $2,650," and to his daughter and her husband he gave five dollars "in full of their share." There were no express words in the will showing that testator intended to subject the farms to the payment of their values to his executor, nor any provision from which such intention could be implied: *Held*, that the farms were not charged in the hands of the devisees with the values named, so as to raise a fund in which the daughter could share.—*Levi Knaub v. Myers*, Penn., 22 Atl. Rep. 814.

103. WILL—Construction.—When a legacy is given to a creditor of the testatrix, equal to or exceeding the amount of the debt, the presumption is that it was intended to be a discharge of the debt; but slight circumstances such as a direction to pay debts, or an inequality between the gift and the debt, or imposition of any condition unfavorable to the creditor, or any want of similitude between the gift and the debt, will be laid hold of to overcome the presumption.—*Deichman v. Arndt*, N. J., 22 Atl. Rep. 799.

104. WILL—Conversion of Real Estate.—Under a will authorizing the executors to sell a part or the whole of real estate at once, but not requiring them to make the sale until 10 years after the death of the testator's widow, who was given a life-estate therein, and directing that after the death of the widow, and the sale of all the real estate, the estate shall be divided in certain shares, etc., the real estate is converted into personalty as at the date of testator's death.—*Underwood v. Curtis*, N. Y., 28 N. E. Rep. 585.

105. WILL — Testamentary Trusts.—A testator gave the residue of his estate to his wife "in good faith, believing that she will make a will, and thereby distribute so much of the last named legacy among my near relatives as she may not use for comfortable maintenance; and it is my will that my said wife shall make such distribution:" *Held*, that the words created the wife a trustee of the residue and its earnings, first for her own benefit, to the extent that she might need it for her comfortable maintenance, and after her death for the testator's next of kin.—*Cox v. Wills*, N. J., 22 Atl. Rep. 794.

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